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In the Supreme Court of the United States

OCTOBER TERM, 1959

HOWARD BRANKLIN CHAPMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	5
Conclusion	8

CITATIONS

Cases:

Allen v. *United States*, 164 U.S. 492 7
Masciale v. *United States*, 356 U.S. 386 6
On Lee v. *United States*, 343 U.S. 747 7
Sorrells v. *United States*, 287 U.S. 435 6
Weinstein v. *United States*, 293 Fed. 388 5

Statute:

26 U.S.C. 5686(a) 2, 5

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OPINION BELOW

The opinion of the court of appeals (R. 303–309; Pet. App. 13–19) is reported at 271 F. 2d 593.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1959 (R. 310; Pet. App. 11). A petition for rehearing was denied on December 17, 1959 (R. 314; Pet. App. 12). By order of Mr. Justice Black the time for filing a petition for a writ of certiorari was extended to February 14, 1960. The petition for a writ of certiorari was filed on February 11, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was properly found guilty of possessing property intended for use in violating the internal revenue laws where he thought the persons to whom he sold sugar were bootleggers, but they were in fact federal agents.

2. Whether the jury properly found that petitioner was not entrapped.

3. Whether there were errors in admission of evidence and in the charge to the jury.

STATUTE INVOLVED

26 U.S.C. 5686(a) provides as follows:

> It shall be unlawful to have or possess any liquor or property intended for use in violating any provision of this chapter or regulations issued pursuant thereto, or which has been so used, and every person so having or possessing or using such liquor or property, shall be fined not more than $5,000, or imprisoned not more than 1 year, or both.

STATEMENT

After a jury trial, petitioner was found guilty under count 2 of an indictment which charged him with possessing on November 26, 1957, quantities of sugar, yeast, and rye meal, the property "being * * * intended for use in the manufacture and production of non-tax-paid distilled spirits," in violation of 26 U.S.C. 5686, *supra* (R. 2–3).[1] The court suspended

[1] Petitioner was found not guilty on count 1 which charged him with possessing on November 21, 1957, sugar and yeast in violation of 26 U.S.C. 5686 (R. 2–3).

the imposition of sentence and placed petitioner on probation for one year (R. 296–297). On appeal, the court of appeals affirmed (R. 310).

The evidence adduced at the trial may be summarized as follows:

Federal alcohol tax investigators learned from a reliable source that large quantities of sugar—an important ingredient in the making of liquor—could be purchased at petitioner's bakery in Atlanta, Georgia (R. 10, 117–118). On October 23, 1957, Investigator Weems spoke with petitioner on the telephone about buying some twenty bags of sugar a week, saying that he did not want federal agents to discover his purchases. Petitioner told him not to worry; that he received sugar through railroad salvage on which there were no reports; and that, when he purchased sugar on which reports were made, he could say he used it at the bakery (R. 10–13). The following day Weems told petitioner that he was not yet ready to buy because his still had been raided. Petitioner told Weems to let him know when he was ready. Petitioner wrote on a piece of paper that the price would be $300 for twenty-one bags, which Weems said was too high (R. 13–14). Petitioner told Weems that the sugar could be loaded on to Weems' truck by switching tags (license plates), since petitioner had a legitimate use for the sugar (R. 15).

On November 21, Weems and another officer purchased twenty bags of sugar from petitioner. Petitioner used the officer's truck with his own tags to get the sugar. He asked the officers what they did with

the bags, and when told that they were burned, said that was good because the bags could be traced (R. 16–21). On November 26, 1957, Weems arranged to buy sugar, rye, and yeast, delivery to be made at petitioner's home. The officers loaded sugar on to their truck from petitioner's truck (R. 22–23). While the sugar was being loaded, petitioner was arrested (R. 111). On his way into town, petitioner told the arresting officers that he was selling sugar to recover financial losses (R. 242).

Subsequently, petitioner visited Roy Kelley, a local supervisor of the Internal Revenue Service, several times in Kelley's offices. During one such visit, petitioner told Kelley that "he didn't know whether or not the particular officers planned to use this material for moonshine, but he was reasonably certain that that was the use to which it would be put" (R. 166).

Petitioner, when he took the stand, said that he thought that the undercover agents bought sugar from him either to inform his competitors as to the price he was asking for sugar or to report to the Health Department whether his place of business was sanitary (R. 217–219). He admitted that the officers said that they were bootleggers, but only after they purchased the sugar (R. 209, 222).

In rebuttal, the government, over petitioner's objections, introduced a recording of the officers' conversations with petitioner on November 21 and 26, 1957. The recording was made by a miniature wire recorder carried by one of the agents (R. 245–248, 255–260). The officer who transcribed the transmissions testified that the tape was a faithful reproduc-

tion of the wire (R. 244). The transcription and recording had been kept in a locked safe (R. 259).

ARGUMENT

1. On the issue of intent the judge charged, in part (R. 285).

> Now, one of the essential elements of this offense is that the defendant in having such property knowing it to be intended for use in producing liquor without the payment of taxes thereon. The ownership of the property is immaterial, but possession of the same with knowledge of its intended use to produce non-tax paid liquor is sufficient.

Thus, the jury in finding petitioner guilty under count 2 necessarily found that petitioner possessed the property with the knowledge that it was intended to be put to an illegal use—precisely the intent required under 26 U.S.C. 5686(a). This finding is fully supported by the evidence that petitioner intended the property to be used for making illegal whiskey. While, of course, the officers did not intend to use the sugar and other materials in this manner, the statute clearly makes only the intention of the seller, and not that of the buyer, relevant. See *Weinstein* v. *United States*, 293 Fed. 388, 389 (C.A. 1).[2]

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[2] The court refused to grant the government's more explicit instruction that the defendant could have intended an illegal use even though the officers themselves did not intend to use it illegally (R. 290–291). Nonetheless, the jury clearly was required to find petitioner's illegal intent in order to convict petitioner under the instruction actually given and petitioner naturally did not object that the court gave an instruction more favorable to him.

2. The issue of entrapment was submitted to the jury under full and proper instructions (R. 286–287). The court charged that the jury must find petitioner not guilty if "the inception of the crime originated in the minds of the Federal officers" and the petitioner "was induced * * * to commit the offense" (R. 287). Substantially the same instructions were repeated when the jury asked to be recharged on the issue of entrapment after it had deliberated for a time (R. 292–293). The jury had ample basis for finding that petitioner was ready and willing to commit the offenses charged, and that the government officers merely provided the means for realizing his preexisting purpose. See *Masciale* v. *United States*, 356 U.S. 386; *Sorrells* v. *United States*, 287 U.S. 435, 451.

3. The various trial errors claimed by petitioner raise no issue of substance.

a. Kelley testified that petitioner called him on the telephone with reference to obtaining possession of the vehicle seized from him. On cross-examination, Kelley admitted that he had not known petitioner's voice when petitioner called (R. 171). The court of appeals concluded, however, that "there were sufficient facts and circumstances to identify [petitioner] as the person with whom the telephone conversation with agent Kelley was had" (Pet. App. 16). More-

over, Kelley's testimony concerning the telephone call was clearly not prejudicial and merely provided background to explain how petitioner later happened to make the admission to Kelley personally (see *supra*, p. 4).

b. Before admitting the tape recording of the conversations between petitioner and the officers, the judge took testimony as to how the recording was made and kept (see *supra*, pp. 4–5). After the recording was played, the judge instructed the jury that any conversations between the officers themselves would not be admissible, and that the statement made by the officer when he placed petitioner under arrest was not binding (R. 280). Thus the court ascertained that the tape recording was an accurate reproduction and carefully limited the jury's consideration by appropriate instructions. In such circumstances, the recording of such face to face conversations constitutes proper evidence. *On Lee* v. *United States*, 343 U.S. 747.

c. After the court had recharged the jury on the issue of entrapment at the jury's request, the court went on to state that it was desirable for the jury to reach a verdict and that therefore the jurors should give deference to, and fully consider, each other's views (R. 293–294). Petitioner's counsel noted an exception "for the purpose of the record" (R. 295). The charge was not coercive, but was a reasonable explanation of the manner in which a jury is expected to function. See *Allen* v. *United States*, 164 U.S. 492, 501.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

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